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IN THE
Supreme Court of the United States

No. 379.

**CHARLES SHERWIN AND HARRY H. SCHWARZ,
PETITIONERS,**

vs.

**THE UNITED STATES OF AMERICA,
RESPONDENT.**

**Brief For Petitioners, Charles Sherwin and
Harry H. Schwarz, Upon Final Hearing.**

Statement of Nature and Result of Case.

(For brevity purposes, Charles Sherwin and Harry H. Schwarz, will be called "Petitioners" and the Government will be called "Respondent.")

Indictment was filed on the 12th day of March, 1923, against Petitioners, and one R. A. Lee, jointly, which indictment contained six counts, the first five counts charging a violation of Section 215 of the Criminal Code of the United States and the sixth count charging a violation of Section 37 thereof, and is fully set out in Transcript of Record, pages 1 to 22, inclusive.

Petitioners pled not guilty, and in connection therewith filed their plea of immunity (Transcript, pages 27 to 30, inclusive), alleging in substance that they were immune from prosecution under the Immunity Law, commonly referred to as the Federal Trade Commission Act, as contained in Articles 8836, and the alphabetical

subdivisions thereof, inasmuch as Petitioners had furnished to John F. Southworth, authorized agent and examiner of the Federal Trade Commission under compulsion, oral testimony, books, documents, contracts, and letters of and concerning the affairs, conditions, operations, control and management of the three oil companies which Petitioners were operating under declaration of trust, known as "General Lee Development Interest; General Lee Interest No. 1, and General Lee Interest No. 2," and upon the operations of which said companies the indictment was predicated; that the oral and documentary testimony was furnished to John F. Southworth, agent of the Federal Trade Commission, by reason of a command in writing (Transcript, page 36), and telegrams addressed to Petitioners and their company (Transcript, page 38), together with numerous threats and demands in person by Southworth, and after he had read the immunity law to these Petitioners, and demanded that they furnish such testimony, or else subject themselves to the penalty of imprisonment and fine, either or both (Transcript, pages 37-8), Petitioners further alleging in said plea of immunity that said testimony was furnished to the Federal Trade Commission long prior to any investigation of them or their companies having been made by a post office inspector, or the grand jury returning said indictment, and that the evidence, both oral and documentary, which they furnished said Southworth, was and is the basis of the indictment against them.

Respondent filed a reply to said plea of immunity (Transcript, page 30), and the testimony of Petitioners, having been introduced respecting said appeal (Transcript, pages 35, 36, 37, 38 and 69), and all of the evidence pertaining to the case on its merits having been adduced, the court instructed the jury, over the exception of the Petitioners, to return a verdict against Petitioners

upon their plea of immunity (Transcript, page 74), and the jury returned a verdict in accordance with said instructions and found the Petitioners guilty on each of the six counts of said indictment, and the court thereupon sentenced them in a penal sum and confinement in the penitentiary. (Transcript, pages 33-34.)

By Writ of Error the cause was carried to the United States Circuit Court of Appeals for the Fifth Circuit, and upon hearing in said court, said cause was affirmed (Transcript, pages 89 to 94, inclusive).

Thereafter, and in proper time, motion for rehearing was filed (Transcript, page 95), and by said Circuit Court of Appeals overruled. (Transcript, page 103.)

A petition for a Writ of Certiorari having been presented to this honorable court, the same was granted on June 9, 1924.

In the trial court, and in the Circuit Court of Appeals various assignments of error were brought forth (Transcript, pages 76 to 79, inclusive), many of which have been, by the Petitioners, abandoned, so that we are before this court with but a single assignment of error and proposition of law, and that is, whether or not these Petitioners, by reason of their having complied with the demands of Southworth, as agent for the Federal Trade Commission, in furnishing certain testimony can be subsequently prosecuted for a transaction or matter about which they had previously given such testimony and evidence.

(Petitioners, in connection with their application for a Writ of Certiorari, and under the same cover therewith, filed in this court an extended brief and argument on the question here involved, which they do not abandon, but here adopt as part of this brief and argument, and the object of this brief and argument upon this hearing is to get concisely before the court the assign-

ments of error and propositions of law germane to the case.)

Petitioners made their assignment of errors in the nature of complaints of the action of the trial court, as is fully shown at pages 76, 77 and 78 of the Transcript; and specify the errors relied upon, as follows:

SPECIFICATIONS OF ERRORS.

1.

The trial court erred in overruling, and in not sustaining Petitioners' plea of immunity in the nature of a plea in abatement, for each and every reason therein assigned, and in failing to instruct the jury to return a verdict of not guilty, as requested by a motion and in a special charge; (Assignment of Errors Nos. 2 and 4; Tr. 76-77) and the Circuit Court of Appeals erred in affirming said action of the trial court, because it was not denied by the government, and the record conclusively established that Petitioners were summoned (or subpoenaed) by the Federal Trade Commission to, and they did, answer a lawful inquiry of the Federal Trade Commission, and there was demand of them by the Federal Trade Commission, and they were compelled by the Federal Trade Commission, under threat, to produce documentary evidence, and they did produce the same, in obedience to the summon (or subpoena) or lawful requirement of the Commission, and the evidence given, information furnished and documents produced were concerning the matters and things about which they were later indicted in this case. Immunity flowed to these Petitioners by virtue of the statute, and they should not have been prosecuted or subject to any penalty or forfeiture for,

or on account of, any transaction, matter or thing about which they testified or produced evidence.

The statute gives the Federal Trade Commission power and authority to demand and compel the production, by subpoena, or by lawful requirement, or by lawful inquiry, evidence, documentary or otherwise, and a person is not excused from giving or furnishing this evidence for the reason that it might tend to incriminate him. If the Federal Trade Commission, by subpoena, or without subpoena but by lawful requirement, demands and receives such evidence, the person so called upon, who furnishes the same, is immune from prosecution for, or on account of any of the transactions, matters or things about which he testifies or produces such evidence. The demand for and compelling the production of, and the receiving of the evidence, documentary or otherwise, or the mere acquisition of evidence, documentary or otherwise, by the Federal Trade Commission, through subpoena or lawful requirement of the commission, within itself gives immunity to the person for or on account of any of the matters and things about which he may testify or furnish evidence.

2.

The trial court erred in peremptorily instructing the jury to return a verdict against Petitioners on the issue of their plea of immunity (Assignment No. 3; Tr. 77) and in charging the jury in substance that the plea of immunity was a question of law, and that he, the court, would instruct the jury to return a verdict for the government and against Petitioners on that issue. (Tr. 74.)

And the Circuit Court of Appeals erred in affirming the action of the trial court, because the record discloses, without contradiction, that the Federal Trade Commission, through Mr. Southworth, demanded of Petitioners, and compelled them, through fear of penalties of the law, to answer a questionnaire, and furnish evidence, documentary and otherwise, to the Federal Trade Commission, and said evidence furnished, and the answers so made, were about and concerning the matters for which they were later indicted, and were then about to be tried. The statute grants immunity from the penalties or forfeitures for, or on account of the transaction, matters or things concerning which they testify or produce evidence to the Federal Trade Commission in response to a subpoena or lawful inquiry, or in obedience to a lawful inquiry, or in obedience to a lawful requirement and the court should not have peremptorily instructed the jury to return a verdict in favor of the government and against Petitioners on their plea of immunity.

3.

The trial court erred in refusing to instruct the jury in appropriate language, and in terms of the law, as to the rights of Petitioners with respect to the issue of immunity as raised by their plea of immunity, and the evidence concerning same, as was set out in the special charges heretofore copied in this petition (Assignment of Error No. 5; Tr. 77-78-79), because the statute gave Petitioners immunity from penalties and forfeiture for, or on account of any transactions, matters and things concerning which they might testify or produce evidence documentary or otherwise

before the Federal Trade Commission. The Petitioners made their plea and claim of immunity in writing before the court, and later before the court and jury; they introduced evidence thereon, and same presented a question of fact and the court should have given Petitioners' requested charges as the same properly presented the law applicable to the issues.

4.

The Circuit Court of Appeals erred in its opinion, wherein it said, "The evidence furnished in compliance with a request or demand by an examiner of the commission, without the issuance of a subpoena, is not, within the terms of the provision of the statute," because this is in our opinion an incorrect interpretation or application of the law. Immunity is given persons who appear before the Federal Trade Commission and testify under oath, or furnish evidence, documentary or otherwise, or who furnish evidence without regard to subpoena or oath to the Federal Trade Commission in answer to any lawful inquiry of the Federal Trade Commission, or who furnish evidence, documentary or otherwise, with regard to subpoena or oath, to the Federal Trade Commission, in obedience to a lawful requirement of the commission. The Circuit Court of Appeals says that the test as to whether immunity flows or not is—did the subpoena issue? Did the witness appear in obedience to the subpoena and testify under oath. The statute says a person can be punished who fails or refuses to attend and testify, or answer a lawful inquiry, or produce documentary evidence (1) in obedience

to a subpoena, (2) in obedience to any lawful requirement of the commission. If a person answers any lawful inquiry without a subpoena, or testifies, or produces documentary evidence, either in obedience to a subpoena or in obedience to a lawful requirement of the commission, he should be equally immune from penalties or forfeiture for or on account of any transactions, matters or things concerning which he may testify or produce evidence. (Pages 89-94.)

BRIEF AND ARGUMENT.

Article 8836, as enacted in 1914 and 1916, having to do with the Federal Trade Commission and those coming under its jurisdiction, not only creates the commission but defines its functions and authority, among which it is empowered to gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practices and management of any corporation, joint stock association or partnership other than banks and common carriers, and their relations to other corporations, associations and partnerships. (Art. 8836-f.) This article further empowers the commission **OR ITS DULY AUTHORIZED AGENTS**, to require the attendance and testimony of witnesses and the production of documentary evidence by said witness, relating to any matter under investigation (Art. 8836-l), and it is made an offense on the part of the individuals having such information to "neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena, or **LAWFUL REQUIREMENT OF THE COMMISSION**," and a failure to so comply with such lawful requirement (Art. 8836-j)

carries with it the imposition of a penalty of not less than \$1,000 nor more than \$5,000 or by imprisonment for not more than one year or by both such fine and imprisonment.

Unless immunity be granted to the person so testifying and furnishing documentary evidence, and meeting the other **LAWFUL REQUIREMENTS OF SAID COMMISSION** it would be in direct violation of the Fifth Amendment to the Constitution of the United States, and to meet this provision of the Constitution, Art. 8836-i provides, "no person shall be excused from attending and testifying, or from **PRODUCING DOCUMENTARY EVIDENCE BEFORE THE COMMISSION** or in obedience to the subpoena of the Commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him might tend to criminate him or subject him to be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence documentary or otherwise, before the Commission in obedience to a subpoena issued by it."

Thus we find a statute whereby the Federal Trade Commission in the furtherance of an investigation may require any individual to give testimony and furnish documentary evidence concerning a matter under investigation by said Commission, and when such testimony is given, the individuals giving the same are immune from prosecutions about any transactions, matter or thing concerning which he had previously testified or furnished documentary evidence. (Art. 8836.)

Sherwin and Schwarz were engaged in the oil business, the drilling of wells and selling of stock; they had organized three companies, to wit, General Lee Interests No.

One, General Lee Interests No. Two, and General Lee Development Interests as evidenced by their three respective declarations of trust (Rec., pp. 39-54), and Sherwin and Schwarz were officers of each of these joint stock associations, were drilling oil wells, purchasing mineral leases and selling stock in each of the said companies. (Rec., p. 39.) These Petitioners had employed Robert A. Lee in whose name the companies were organized and operated (Rec., pp. —), and these Petitioners were to pay Robert A. Lee the sum of \$50 per month and 10 per cent of the profits of said company.

These petitioners had secured drilling contracts and had a list of all of the purchasers of stock in either or all of their companies, and all of these matters or at least a greater portion thereof, were known only to these Petitioners, and the documentary evidence was possessed only by them. (Rec., p. 59.)

The Federal Trade Commission was making an investigation of various oil companies, and acting through Otis B. Johnson, its Secretary, the Federal Trade Commission mailed to Petitioners, which was by them duly received, a letter demanding all of the information and facts possessed by these Petitioners concerning the operation of these three companies (Rec., p. 36) which letter is as follows:

"Washington, July 30, 1922, General Lee Development Interests, Edwards Building, Forth Worth, Texas, Sirs: **This Commission officially requests** that under sections 5, 6, 9 and 10 of the Federal Trade Commission Act that you report to it and furnish at once information called for by the annexed schedule. As to any portion thereof which you can not answer immediately, please supplement your first statement within seven days upon receipt of this letter. The Commission will consider application for an extension of time to answer any specific question for good cause shown. **Your attention is respectfully**

called to the penalties provided in Section 10 of the Federal Trade Commission Act (last page of Schedule A herewith enclosed) for any failure, refusal, delay or falsification of, or in any report made in answer to this Commission's lawful inquiry.

"This Commission is charged with the duty of preventing unfair methods of competition and with the investigation of corporations and it may make public so much of the information it obtains as it may deem in the public interest. It is believed that the small inconvenience of filing this information which we now request will be borne cheerfully in general because of the benefit which will accrue to the public and because of its interest therein. Very truly yours, Federal Trade Commission. Otis B. Johnson, Acting Secretary."

Petitioners refused to give the testimony and information requested in said letter. Later on, John F. Southworth, agent of the Federal Trade Commission, called at the office of the General Lee Company, which was in charge of these Petitioners (Rec., p. 37) and demanded that Petitioners furnish such information. Petitioners replied that they did not have to furnish him with the information. Thereafter these Petitioners complied with said demand and furnished the information, gave the testimony, answered the questions and furnished documentary evidence, as shown by the testimony of Petitioner, Sherwin, beginning (Rec., pp. 35, 36, 37, also 59 to 69, inc.).

"Southworth then said, we did come under the jurisdiction of the Federal Trade Commission and that by not answering the questionnaire sent to us, we were committing a crime subject to a penalty of imprisonment and fine, either or both. (Rec., p. 37.) I told

him I had consulted my attorney, Mr. Turner, at that time, who advised me that we did not come under the jurisdiction of said Federal Trade Commission, and that we did not have to fill out or file any questionnaire sent to me, by the Federal Trade Commission. (Rec., p. 37.) Mr. Southworth then asked me for the address of my attorney and I gave it to him. He again told me we were committing a crime (Rec., p. 37), and that he would take the matter up with Mr. Turner and convince him that we were committing a crime by not answering questions, and said he would show him a copy of the law. (Rec., p. 37.) Southworth had an appointment with Mr. Turner and they met in our office, and read the law to Mr. Turner, Mr. Schwarz and myself, after which Mr. Turner then advised me that in accordance with that law we were committing a crime by not answering the questions. (Rec., p. 37.) We then gave him (Southworth) everything that he demanded, the declarations of trust, copies of contracts, copies of leases, showed the record of our books, gave him a list of the stockholders and some correspondence we had on some of them. (Rec., p. 37.) We let him read that and make notes as he went along, and had copies made for him of any document that he demanded. We had contracts between Mr. Lee, Mr. Schwarz and myself, and Mr. Southworth demanded them and we gave them to him (Rec., p. 37); in fact, we surrendered to him everything that he demanded. The documents that we surrendered to him were from our files and office. The contracts were all typewritten, the leases were partly typewritten and partly on forms filled in. He got the names of our stockholders from our stock ledger. The stock ledger was furnished him by Mr. Schwarz. We were both present all of the time, and acted together in furnishing Southworth this information. (Rec., p. 37.)

"This gentleman (Mr. Southworth) came to our office a half dozen times before we gave him any information. (Rec., p. 37.) After we began furnishing him with documentary evidence and information, he came to our office about twenty times. When he left our office and this city, he left with these documents in his possession. After Southworth left the city we received communications from him by telegram. The four documents you now hand me are the two telegrams received from Southworth by us, and of my two replies thereto, and they are marked Exhibits 4, 5, 6 and 7 (the exhibits were offered and admitted in evidence) and are as follows:

"No. 4. October 27, Eldorado, Arkansas, Charles Sherwin, care General Lee Development Interests, Edwards Building, Fort Worth, Texas. Advise if lists sent Garrett Hotel, Eldorado, not received. Southworth."

"No. 5. Fort Worth, Texas, October 27, 1922. John F. Southworth, Garrett Hotel, Eldorado, Arkansas. Sherwin out of town. Advise how long you will be there. Will wire you later. Regards. H. H. Schwarz."

"No. 6. November 8th, Kansas City, Missouri, General Lee Development Interests, Edwards Building, Fort Worth, Texas. Has list been sent. Leave Kansas City tonight. Wire general delivery. Southworth."

"No. 7. November 8, 1922. John F. Southworth, General Delivery, Kansas City, Missouri. List mailed last night. Regards. Charles Sherwin." (Rec., p. 38.)

These petitioners further testified in substance (Rec., p. —) that they refused to give Mr. Southworth any of the information, testimony or documents that he was

seeking for the Federal Trade Commission, and as agent thereof, until they were convinced that it was their duty, by virtue of Art. 8836 and the subdivisions thereof, to furnish the same; that Southworth presented and read this law to them, and in effect threatened them with prosecution unless they did surrender this evidence and these documents. Further testifying, these Petitioners said (Rec., p. 39): "I never did make at any time, or intend to make any statement that I had waived any rights which the laws of the land gave me," and furthering testifying, Petitioners said (Rec., p. 39):

"No one had a list of our stockholders, save and except us (Sherwin, Schwarz and Lee), and our companies (Rec., p. 59), and no one had a copy of the contract between Mr. Schwarz and myself on the one hand and Mr. Lee on the other; that document was not recorded. (Rec., p. 59.) He, Southworth, inquired into the date of incorporation and we answered every question and he put down the answers to each and every question on the questionnaire. I believe there are fifty questions on that questionnaire. We answered these questions at the demand of Mr. John F. Southworth. (Rec., p. 59.) . . . He (Southworth) reported himself to be an agent of the Federal Trade Commission. (Rec., p. 36.) . . . When he called upon us and made himself and his official position known, he wanted to know why we had not answered the questionnaire sent us from Washington" (Rec., p. 37).

Further testifying with respect to the character of the testimony, information and documents furnished the Petitioners said (Rec., p. 60).

"In addition to this, I gave Southworth the address of the largest stockholders we had at that time. We let

him make notes from correspondence which he wanted to read, and this correspondence related to the purchase of interests of some of our stockholders who had already purchased stock. (Rec., p. 60.) In some instances the letters would be complaints made and I showed Southworth how we adjusted that complaint or replied to it. **We not only showed him letters which related to matters that had been satisfactorily adjusted, but we showed Southworth other letters in which complaints were made that had not been adjusted. He specifically called for those letters. (Rec., p. 60.)** . . . He did not mention the name of the stockholders who had specifically complained, but he wanted letters containing complaints, if any, we had at that time." (Rec., p. 60.)

The questionnaire contained some fifty questions with subdivisions thereunder, which sought every character of imaginable information respecting the organization and operation of the three companies in which these Petitioners were interested, were fully answered by these Petitioners to Southworth, and it gave to the Federal Trade Commission, through Southworth as their agent, every conceivable bit of knowledge which these Petitioners possessed without an exception, including the taking of the said John Southworth out to the field upon the lease where the well was being drilled, and there explaining to him in detail the physical property and their mode of operation. The questions and answers to the questionnaire fully disclosed all the methods employed by these Petitioners, both private and public. (Rec., pp. 59 to 68, inclusive.)

It was established beyond any peradventure of a doubt, and was uncontradicted that John F. Southworth was and is the authorized agent of the Federal Trade Commission, such as is mentioned in Article 8336, not only

by the documents and the testimony of the defendants, but by the government's witness J. S. Swinson, who testified that he was a post office inspector, and that

"I know John F. Southworth (Rec., p. 70). I met him last fall . . . As near as I can get at it, his business is to procure information for the Federal Trade Commission of the United States Government. I think his title is Special Examiner Federal Trade Commission."

Article 8836 provides, "Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of an offense, etc." It will thus be observed that these petitioners at first refused to give this testimony, notwithstanding the letter from Johnson, the Acting Secretary of the Federal Trade Commission and notwithstanding the five or six visits of Southworth to their office, and his appeals to them personally demanding said information, and only gave said testimony upon being convinced that under Article 8836 they were not permitted to refuse to give same FOR ANY REASON and after this law was read to them, and explained, both by Southworth and attorney for these Petitioners to have that effect.

It is true no subpoena was issued, but inasmuch as the witness was present before Southworth, it was unnecessary that a subpoena should issue. This question is fairly discussed and that principle clearly announced in the case of the United States *vs.* Armour & Company, 142 Fed., 808, in which case the court was discussing a similar question arising under a similar statute, granting immunity, known as the Interstate Com-

merce Act, which was enacted February 11, 1893, in which the court said:

"But it is insisted by the government that they had not given under compulsion because they did not give under what is known in law as a testimonial compulsion, and it is argued that testimonial compulsion means compulsion furnished by the subpoena and oath. . . . The subpoena is not necessary where the person is present in court or within the verge of the court. The only object of the subpoena is to secure the attendance. It is superfluous when he is present, without subpoena (*United States vs. Sanborn*, 28 Fed., 299, at p. 302). . . . I am clearly of opinion that the best judgment to be had from all of the authorities is that the subpoena is a useless and superfluous thing after the tribunal and witness are together. And I am also of opinion that under these acts in question, these immunity laws, the production of books and papers would be legal evidence without the oath of any person, when they are adduced as showing admission against interest and against the party producing them."

And while no oath was administered, yet from the sound reasoning set forth in the *Armour* case, *supra*, that neither a subpoena to require attendance nor oath for the giving of testimony was used, that neither was necessary, and that said proceedings and the testimony given at such hearing amounted to the same as a matter of law as if the subpoena had actually been issued and the oath administered. In any legal proceeding a defendant may waive the issuance of a subpoena and present himself in court and obtain the same protection as if actually subpoenaed, and likewise the government may waive the administering of the oath to a

witness, in either of which events the result of their having come in contact with each other for designated purposes would be the same.

It is apparent from the reading of Article 8836-j that the subpoena and oath each might be dispensed with, for that an individual is penalized not only for refusing to attend and testify, but "OR TO ANSWER ANY LAWFUL INQUIRY OR TO PRODUCE DOCUMENTARY EVIDENCE," and while this is subsequently said to be in obedience to a subpoena, it also says, "OR LAWFUL REQUIREMENT OF THE COMMISSION," and certainly without dispute it must be said that Southworth had required these defendants "to answer any lawful inquiry" in obedience to a "lawful requirement of the Commission." And if he choose to waive the swearing of the witness on behalf of the government, the government ought not to be permitted to take advantage of it at any time thereafter.

The hearings by the Federal Trade Commission had before its agent, John F. Southworth, in which these Petitioners furnished the testimony and documents aforesaid, was had beginning June 30, 1922 (Rec., pp. 36-37), and before the convention of the grand jury at which this indictment was returned, and before the convention of the grand jury which was March 12, 1923 (Rec., p. 1), and necessarily before the date of this trial.

The indictment and the several counts therein contained discloses that the alleged offenses set forth therein were based upon the transactions, matters and things concerning which the Petitioners had previously testified and produced evidence, documentary and otherwise, before the Federal Trade Commission, and upon these charges these petitioners were subsequently

convicted (Rec., p. 32); in fact, some of the identical documents and contracts, or at least copies thereof, which petitioners testified they furnished to the Federal Trade Commission, and in which in some instances no one except these defendants had knowledge or copies until the same was furnished to John F. Southworth, was introduced as evidence against these Petitioners upon the trial of this cause, on its merits, and was a part of the evidence used in securing their conviction. About this, the government can make no contention, because it is an agreement contained in the record respecting the same, which is as follows (Rec., pp. 71 and 72):

"That the government's exhibits one, two and three, the same being the declaration of trust of the General Lee Interests No. One, General Lee Interests No. Two and the General Lee Development Interests, respectively (which are copied herein), were introduced by the government in the trial of this case on its merits; that identical copies of each of these documents are the same ones which the defendants Sherwin and Schwarz testified that they gave to John F. Southworth, agent of the Federal Trade Commission, and that each of these documents were recorded in the deed records of Tarrant County, at the time the copies thereof were furnished. That the government exhibit No. , the same being a contract between the General Lee Development Interests, through its trustees as first parties, and Sherwin, Schwarz and Lebenson, as second parties, of date April 12th, 1922, and the same containing a copy of the agreement by and between R. A. Lee and Sherwin and Schwarz, concerning the compensation of the said Robert A. Lee for his services in said company (a copy

of which contract is contained herein) is the same and identical contract of which the defendants Schwarz and Sherwin testified they gave copies to John F. Southworth, and that said contracts were not of record, and that this last mentioned exhibit was introduced by the government in the trial of this case on its merits."

This alone, we think, is sufficient to show that the inquiry of the government as to the acts of the Petitioners upon the trial of this case involved the same identical questions as were involved and inquired into and about by the Federal Trade Commission agent, John F. Southworth, when these Petitioners were before him as a tribunal many months before any criminal investigation, such as finally culminated in the conviction of these Petitioners, was given; but this is not all, in fact, is but a small part of the transactions, matters and things inquired about by the court in the trial upon the merits, but this can only be reflected by this tribunal, in the absence of a full statement of facts, by a reference to the allegations in the various counts of the indictment herein, the proof of which was necessary to a conviction.

It will be noted the first count of the indictment (Rec., p. 2), in which the conspiracy, scheme and intent to defraud and artifice to obtain money and property by false pretenses, etc., refers exclusively to these petitioners' organization and promotion and sale of shares of stock in three oil companies named therein, to wit: General Lee Interests No. One, General Lee Interests No. Two, and the General Lee Development Interests (Rec., p. —), in the form of trust estate for the pretended purpose of engaging in the pro-

duction and sale of oil and leases for profit, all of which information as to the methods, management and operation thereof was secured from these defendants by the Federal Trade Commission. (Rec., p. 37.)

It is further shown in said indictment and in count one (Rec., p. 4), that it was a part of the scheme to advertise Robert A. Lee as the complete manager and director of these companies; that in truth and in fact said companies were not under his management and direction, but were dominated and controlled by these Petitioners, and that in truth and in fact, as the Petitioners then and there well knew, the said Robert A. Lee had not been known to the said financial world, but "IN FACT LOANED HIS NAME TO SAID SCHEME FOR \$12.50 PER WEEK." From this averment it can be readily seen the important part played by the securing of the contract between Sherwin and Schwarz on the one hand and Lee on the other, in sustaining this allegation of artifice and scheme to defraud; for that these Petitioners testified and it was not disputed that no one other than these Petitioners had any knowledge of, or possessed a copy of this contract which disclosed his employment at \$12.50 per week until Southworth secured same for the Federal Trade Commission. (Rec., p. 59.)

It is not intended to be said here, in the absence of a record to support us, that proof of all of the allegations contained in said indictment was furnished by Sherwin and Schwarz to the Federal Trade Commission, and afterwards by that branch of the government transmitted to some other branch that was seeking to prosecute these defendants therein, but we do respectfully assert that all of this information upon which this indictment and the various counts thereof are based, was furnished to the Federal Trade Commission long

before an investigation by the grand jury which returned the indictment and long before the convention of that body. (Rec., p. 38.)

Some of the documents (not all, however) which Petitioners furnished to the Federal Trade Commission, were recorded in the public records, and, we may presume, might have been obtained by the Federal Trade Commission through that agency. That is not the question for determination here. It is not a question how they could have gotten the testimony and the documents, but a question of how they actually did get them from these Petitioners. (Art. 8836.)

In view of the Federal Trade Commission Act and the powers and duties of its agents thereunder, and the benefits and burdens affecting individuals called upon to give testimony, and in view of the testimony, documentary and otherwise, furnished by these petitioners, can it be said that this government should be permitted to penalize them in a criminal action in which the same questions are involved?

It is the contention of the government, and as was concluded by the trial court (Rec., pp. 82-87), "there was no suggestion at any time by anybody of a possible claim of, or reliance upon, expected immunity." The government, in substance, contended there was no demand by the Petitioners for immunity on the part of these Petitioners in the giving of this testimony before the Federal Trade Commission, and no notice given the government by the Petitioners as to their intentions so to claim immunity, and they were, therefore, not entitled to it. This, we think, is fairly answered in the opinion of the court in the case of *United States vs. Armour & Company*, 142 Fed., 808, this excerpt from page 821:

"The fifth amendment deals with one of the most cherished rights of the American citizen, and has been construed by the courts to mean that the witness shall have the right to remain silent when questioned upon any subject where the answer would tend to incriminate him. Congress, by the immunity laws in question, and by each of them, has taken away the privilege contained in the amendment, and it is conceded in argument that this can not be done without giving to the citizen, by way of immunity, something as broad and valuable as the privilege thus destroyed. We are not without authority on this question. By a previous act, Congress undertook to take away the constitutional privilege by giving the citizen an equivalent, and the Supreme Court held, in the case of *Counselman vs. Hitchcock*, 142 U. S., 547, that the substitute so given was not an equivalent. Then, at various times, the immunity acts in question were passed by Congress with full knowledge that in furnishing a substitute for this great right of the citizen it must give something as broad as the privilege taken away. It might be broader, but it could not be narrower. (142 Fed., 808.)

"Now, in my judgment, the immunity law is broader than the privilege given by the Fifth Amendment, which the act was intended to substitute. The privilege of the amendment permits a refusal to answer. The act (immunity) wipes out the offense about which the witness might have refused to answer. The privilege permits a refusal only as to incriminating evidence. The act (immunity) gives immunity for evidence of, or concerning the matter covered by the indictment, and the evidence need not be self-incriminating. The privilege must be personally claimed by the witness at the time. The immunity flows to the witness by action of law, and without any claim on his part." (142 Fed., 808.)

The principles relative to this immunity "flowing to the witness as a matter of law, are thoroughly discussed in an opinion by this court, delivered by Mr. Justice Brown in the case of *Hale vs. Henkel*, 26 Sup. Ct. p. —; 50 Law Ed., 652, in which the court said:

"The extent of this immunity was fully considered by this court in *Counselman vs. Hitchcock*, supra, in which the immunity offered by revised statutes, Section 860, was declared to be insufficient. In consequence of this decision, an Act was passed applicable to testimony before the Interstate Commerce Commission in almost the exact language of the act of February 25, 1903, above quoted. This Act was declared by this court, in *Brown vs. Walker*, 16 Sup. Ct., 644, 40 Law Ed., 819, to afford absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his constitutional rights to refuse to answer. Instead, the act was passed apparently to meet the delation of *Counselman vs. Hitchcock*, supra, that 'a statutory enactment, to be void, must afford absolute immunity against further prosecution for the offense to which the question relates.' If the constitutional amendment were unaffected by the immunity statute, it would put it within the power of the witness to be his own judge as to what would tend to incriminate him, and would justify him in refusing to answer almost any question in a criminal case, unless it clearly appeared that the immunity was not set up in good faith."

Thus, it is observed, that by virtue of the immunity clause in Art. 8835j, an individual giving testimony can not claim his privilege on account of the same being incriminating as against him, and that the immunity from prosecution thereafter flows as a matter of law. This principle is approved by this court in *Nelson vs. U. S.*, in which an immunity statute and the right

of a witness thereunder was being discussed, and the *Hale vs. Henkel* case, *supra*, was cited with approval. 26 Sup. Ct., 358; 50 Law Ed., 673.

In *Brown vs. Walker*, opinion by Mr. Justice Brown, 16 Sup. Ct., 644; 40 Law Ed., 819, in which the court was discussing immunity from prosecution on account of evidence given before the Interstate Commerce Commission, the court said:

"The act of Congress in question, securing to witnesses immunity from prosecution, is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon, either in England or in this country, although the Constitution vests in the President power to grant reprieves and pardons for offenses against the United States except in cases of impeachment, this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction; although, as was said by this court in *Ex Parte Garland*, 71 U. S., 333, it extends to every offense known to law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. . . . Amnesty is defined by the lexicographers to be an act of the Sovereign power granting oblivion, or a general pardon for a past offense. . . . and is usually exercised in behalf of certain classes of persons, who are subject to trial, but have not yet been convicted."

And this court, further commenting on this question, used the following language:

"Thus, in *State vs. Nowell*, 58 N. H., 314, a statute which provided that a clerk, servant or agent should not be excused from testifying against his principal, but that he should not thereafter be prosecuted for any offense

disclosed by him, was held to have deprived him of his privilege of silence. In delivering the opinion the court observed that "the legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection, must relieve him from all liabilities on account of the matters which he is compelled to disclose; otherwise the statute would be ineffectual! He is to be secured against all liability and future prosecution as effectually as if he were wholly innocent. This would not be accomplished if he were left liable to prosecution, criminally, for any matter in respect to which he may be required to testify. The additional exception becomes absolute when the witness testifies, and he being no longer liable to prosecution, he is not compelled, by testifying, to accuse or furnish evidence against himself . . . the legal protection of the witness against prosecution for crime disclosed by him is, in law, an equivalent to his legal innocence of the crime disclosed."

In the case of *Heike vs. U. S.*, 30 Sup. Ct., 539; 54 Law Ed., 821, in which the court decided that an appeal from an interlocutory order overruling a plea of immunity did not lie until a conviction of the defendant was had, after which time it might be brought up for review, and in discussing the question of immunity said: "We think then that the effect of the immunity statute in question is not to change the system of appellate procedure in the Federal courts, and give a right of review before final judgment in a criminal case, but was intended to provide an effectual defense against further prosecution, which, if denied, may be brought up for review after the final judgment in the case."

The Petitioners filed their plea of immunity. (Rec., p. 27.) The testimony in support thereof (Rec., pp. 35

to 71) was heard by the court and jury, the facts being undisputed, should have been sustained by the court.

It is undisputed from the record in this cause that a duly authorized and commissioned officer of the Federal Trade Commission subpoenaed the General Lee Development Interests, of which these Petitioners were officers, to furnish him such official information pertaining to their business. (Rec., p. 36.) A subpoena legally means a process, to cause a witness to appear and give testimony under a penalty. Necessarily a subpoena means more than the process of the court, because in this instance the Act creating the Federal Trade Commission, authorizes it to subpoena witnesses and compel them to give testimony and furnish information under a penalty. There is no set form for this kind of subpoena. If it is duly issued by the Federal Trade Commission, or its officers, and demands information pertaining to such matters as the Federal Trade Commission may desire to seek information, it is, with the contemplation of this act, a subpoena. Then, the Petitioners were duly and legally subpoenaed in this case. This subpoena Petitioners obeyed.

The Act creating the Federal Trade Commission empowered such commission to have and hold hearings, and to compel witnesses to come before it, and empowered it to compel these witnesses to testify and furnish information and produce documentary evidence. Congress had in mind that the Federal Trade Commission would sit at some place convenient for it, and Congress desired to furnish this Commission means by which it could compel witnesses to come before it at its convenience. In the instant case, the duly authorized officer of such Commission, and so acting, was the Commission, saw fit, either for his convenience or to expedite matters, and to force obedience to his subpoena, to take himself, the Commission, to the office of the General Lee Inter-

ests, instead of compelling the General Lee Interests and its officers to come to him, and having so taken the Federal Trade Commission to the offices of the General Lee Interests in Fort Worth, he demanded to know why its officers had not complied with his subpoena and furnished the information requested and demanded. (Tr. 37.)

There the Federal Trade Commission demanded of the officers of the General Lee Interests why they had not complied with his (the Commission's) subpoena to furnish information requested and demanded, to which the General Lee Interests, speaking through these Petitioners, stated that they were not under the supervision of the Federal Trade Commission, and for that reason were not compelled to obey this subpoena and furnish the information requested and demanded. (Tr. 37.) Whereupon, the Federal Trade Commission, dealing fairly with a citizen, advised Petitioners that they were under the supervision of the Federal Trade Commission, and were compelled to furnish information and to obey the subpoena, which had been directed to and served upon them (Tr. 37.) Petitioners were not convinced of the authority and power of the Federal Trade Commission, and the Federal Trade Commission, further dealing fairly with a citizen, undertook to point out, read and explain its powers and authority and to convince Petitioners that they were in error, and must obey the process, requests and demands of the Federal Trade Commission. (Tr. —.) Petitioners still not convinced, told the Federal Trade Commission that their attorneys had advised them that they were not under the control of the Federal Trade Commission, and the Federal Trade Commission, still dealing fairly with a citizen, requested the address of the attorney, and to convince the attorney and Petitioners that Petitioners were compelled to obey the subpoena of the Commission and furnish the testimony and infor-

mation requested and demanded, and to that end, met again in their office, when their attorney was present, and again read to Petitioners and their attorney the law under which the Federal Trade Commission was then asserting his authority, and explained his power, which permitted him, and authorized him and empowered him to request and demand testimony and information from Petitioners, and to that end explained to the attorney and Petitioners that by Petitioners' refusing to furnish the information they were committing a crime, and read to the attorney and Petitioners in the same connection with his power to demand the information, his power also to penalize Petitioners if they refused to comply with his demand and request. Having convinced the attorney of Petitioners, the attorney advised Petitioners that they were under the supervision of the Federal Trade Commission, and that they were compelled to comply with the demand or request from the Federal Trade Commission, and furnish information, documentary or otherwise, and testify before the Trade Commission, and if they refused that they were guilty of a crime, and could, by the Federal Trade Commission, be punished. (Tr., 38 and 68; Tr. —.)

We believe our statement that the letter of the Federal Trade Commission directed to the General Lee Interests, and which they received (Tr. 36) was a subpoena; and further in this connection, we call this court's attention to the reading of the statute, Section 7937 (Compiled Statute Section 8836-J) in part as follows:

"Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty," etc.

If we are not correct in this being technically a subpoena, we can at least say that the Federal Trade Commission adopted this method of demanding the information, to the end that they might receive it for its same value and worth as if it had been secured by a subpoena; and this requirement in the letter was the choice of the Trade Commission, and it was its method of seeking to enforce its power; and when he called upon Petitioners he had not further armed himself with any process or subpoena, demands of Petitioners, not that they comply with a subpoena that he then had, or that they comply with any other process other than the letter which he had directed to them, he asked Petitioners why they had not complied with that process, letter, subpoena or lawful request, and furnished the information demanded. (Tr. 37.) This letter was at least a lawful inquiry under the Federal Trade Commission Act, and it called for information to be furnished the Federal Trade Commission in obedience to lawful requirement, and the Federal Trade Commission, speaking through Mr. Southworth, said to Petitioners: "If you neglect or refuse to answer this lawful inquiry or produce the documentary evidence in obedience to the lawful requirement of the Commission, you have committed a crime and subject to punishment for not less than one thousand nor more than five thousand dollars, or imprisonment for not more than one year, or both." (Tr. 37.)

The Circuit Court of Appeals, in affirming this case, says that the plea of immunity is not good because no subpoena was issued and neither of the Petitioners were sworn, and none of the statements made by Petitioners in pursuance of the request or demand of Southworth was under oath. Thereby saying that Southworth was not acting as the Federal Trade Commission, and was not acting within his power and authority when he called

upon Petitioners and demanded and received the information from, and documentary evidence of these Petitioners. The Circuit Court of Appeals by this statement says that the Federal Trade Commission has no authority to demand or receive information except that it subpoena a witness, and cause the witness in obedience to subpoena, to come before it and testify or produce these documents, and that it can not receive such information then except that it swear the witness. If the Circuit Court of Appeals is correct in this, then Southworth, or the Federal Trade Commission, was wrong when it and he stood before Petitioners and said that they were compelled to give this testimony under penalty of being punished as criminals. (Rec., p. 37.)

The Federal Trade Commission, through Mr. Southworth, informed of its authority and powers as it is, well knew that if it pursued the power and authority to demand of any person that he testify before it, and that he furnish it information, that such act by it furnished immunity to the person interrogated and from whom the information was obtained. The same law that gave it the authority to demand the information and receive it, advised it that when it did so, immunity flowed to the man it was seeking the information from by virtue of its own demand, and because of its act it granted immunity to the citizen about the matters it asked him about or got information from him on. **The government would be unfair to its citizens to arm its agents, and permit them to go to this citizen clothed with such authority, and demand information under the penalty of putting him in jail if he refused to give it, then say to him that if he complied with their demand he did not have the benefit of the same law under which they were claiming their authority.**

Mr. Southworth—and thereby the Federal Trade

Commission—thought that he and it had the right to go to Petitioners and demand this information; he convinced Petitioners that he had such a right. Then, in order to deal fairly with the citizen, the government should say to him, “Did you believe that you were compelled to give this information requested and demanded of you by the Federal Trade Commission; if you thought you were compelled to give it, and if you gave it involuntarily to the Federal Trade Commission upon its demand, order, subpoena or other lawful requirement as the statute prescribes, then you have for your safeguard the statute which was enacted for your benefit; as we take from you the benefit and safeguard of the Fifth Amendment, and we armed ourselves with the law which took from you that safeguard, and demanded and compelled you to give us testimony in violation of that amendment; at the same time, the law which gave us that authority, gave you the right to say that you should not be prosecuted for anything concerning which you had testified and furnished information.

We desire to call the court's attention to what we believe is fair dealing between the government and its citizen:

“This court is entirely sensible of the necessity for apprehending criminals, of the advantage of having criminals suffer for their offenses; but it is equally sensible that there is a higher obligation on government than that of catching one more or less offending criminal—the obligation of keeping faith with the individual. Whenever the time comes when the courts, in their eagerness to apprehend criminals, deny to the accused that which the laws and the Constitution give him; when men are convicted of offenses against their government, and in the process of that conviction

every right which the genius of their country gives them is extended—they can but submit. When, however, they are convicted through a denial of a substantial right extended to them by their government, they can but despair; and when courts permit a construction of the law which makes the government break faith with individuals, whether offenders or not, then the reason for courts has ceased, and justice is no more.” (U. S. vs. Pardue, 294 Fed., 543.)

While the facts of the two cases are not exactly similar, the discussion by the court comprehends the situation such as we have in this case, and we desire again to quote from the above decision:

“In what has been said it is not meant to hold that the mere fact of a subpoena confers an exemption. The controlling question is: Did he testify voluntarily, or upon compulsion; and it is in my opinion immaterial in law whether the witness testified under a subpoena or was called without a subpoena and put upon the witness stand upon compulsion by the government. Upon the controlling issue of fact in cases of this kind, however, whether a witness testified voluntarily or upon compulsion, if a witness appears under a subpoena and is placed upon the stand by the government, the fact of compulsion is *prima facie* established, and the burden shifts to the government to show, notwithstanding all of the indicia of compulsory testimony, the witness in fact waived his privilege and testified voluntarily.” (U. S. vs. Pardue, *Supra.*)

In the instant case the Petitioners have undertaken the burden of showing, both that they were not sub-

poenaed and that they were compelled to testify—at least they were convinced by the Federal Trade Commission that they were compelled to testify, and beyond contradiction this record establishes that they did not testify voluntarily:

The Circuit Court of Appeals in its opinion, adopts, in our judgment, a most unreasonable, unfair and narrow construction of this statute. It says (Rec., p. 93):

“The language of the amnesty or immunity provision, especially when that language is considered in the light of its context, manifests the absence of any intention to grant amnesty or immunity to a person who furnishes evidence without a subpoena to him having been issued by the Commission.”

To establish the narrowness of this, we feel it only necessary to quote to this court the statute:

“No person shall be excused from attending and testifying or from producing documentary evidence before the Commission or in obedience to the subpoena of the Commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty.” (Art. 8836.)

We ask your patience in this. Congress had in mind that information might be had in other ways than by a subpoena, because it says, “No person shall be excused from attending and testifying,” and it does not refer to “under subpoena or other process.” And it then says, “or from producing documentary evidence before the Commission.” It does not, in this instance, say, “Or in obedience to a subpoena or other process.” And then it says, “or in obedience to a subpoena of the Commission.”

Congress did not see fit to prescribe a form for a subpoena, or direct the mode and manner in which subpoenas should be issued and served for either the attendance of the witness on the production of documentary evidence or the acquisition of the same by the Federal Trade Commission, but it did provide "For the purposes of this Act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against." This court will see that in this language, Congress said that the officers of the Federal Trade Commission had the right, of course in a lawful manner and mode, to get information, access to documents and take copies thereof. Then, having in mind that some obstruction might be met, or an effort might be made to conceal this information, provides, just following the above: "and the Commission shall have power to require by subpoena the attendance, and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." Thereby showing that the Commission had the power and authority to get the information it desired without the issuance of a subpoena, but, if it was necessary, they had the power to compel the witness to give and produce the testimony and documents. Then Congress said: "Any person who shall neglect or refuse to attend and testify (this carries with it the suggestion of answering a subpoena) or to answer any lawful inquiry." If it was intended that a subpoena was necessary to get any information, why should Congress say that a person was guilty of an offense if he failed to answer any lawful inquiry. Further, if a person fails or refuses to testify or produce documentary evidence, "in obedience to the subpoena (of course a subpoena has been issued and served), or to produce documentary evidence in obedience

to a lawful requirement of the commission;" then if a subpoena was the only method, why should Congress say that a citizen was guilty of a crime and subject to punishment if he failed to give information or produce documentary evidence in obedience to a lawful requirement?

The Circuit Court of Appeals has said that before a person can be immune he must have been summoned and attended under the compulsion of a subpoena and give testimony under oath. Congress and the law under which this man claims his immunity, did not so limit his rights.

Congress gave the citizen immunity in at least two instances: One, when he obeys a subpoena and testifies or gives documentary evidence; the other, when he answers a lawful inquiry made in obedience to a lawful requirement of the Commission. And in this instance the Federal Trade Commission asserted in its letter or demand, and through its agent Southworth, that it was making a lawful inquiry, and that petitioners must obey this lawful requirement of the Commission and give testimony under compulsion, and under penalty for refusing. Yet, the Circuit Court of Appeals in this case, says that the only way a person can become immune is to be summoned, attend under process of the subpoena, and give testimony under oath; thereby saying that the only lawful way by which the Federal Trade Commission could get testimony or documentary evidence, is in response to a subpoena; yet, the Federal Trade Commission itself, through Mr. Southworth, says to Petitioners that it had the right to compel them to answer their letter and demand, which they say was an official request, and if Petitioners failed to comply with and obey this official request, Petitioners were guilty of a crime and might be punished." (Tr. 68.)

The Circuit Court of Appeals in its opinion says: "Evidence furnished in compliance with a request or

demand of an examiner of the Commission, without the issuance of a subpoena to the person furnishing such evidence, is not within the terms of the provision." (Tr. 94.)

This is the entire opinion of the Circuit Court of Appeals. These four lines include and comprehend the entire opinion of the court. The rest of the opinion is argument and persuasion, attempting to justify the conclusion reached therein. We can do no better than to again refer the court to the quotation in the case of the United States *vs.* Pardue, to answer this conclusion; and the United States *vs.* Armour & Company, 142 Fed., 808, previously referred to and quoted in this brief.

A subpoena serves the purpose only of compelling a witness to come to the tribunal and testify. If this tribunal sees fit to take itself to the witness and there compel the witness to testify, then a subpoena is useless, and the tribunal has accomplished its purpose without the office of the subpoena; and if the tribunal accomplishes its purposes by a threat or coercion or punishment, the witness has been as much compelled to involuntarily deliver up his testimony and documents as if the tribunal was clothed with all the dignity of a court and its attachees and its processes, and we submit that this record discloses that these Petitioners refused to give testimony or produce documents until the tribunal convinced their attorney, and he advised them that they were compelled, under penalty, to testify and deliver documents; and then, and then only, and not until then, did they answer questions or give information.

We have burdened this court at length, but we thought the rights of these Petitioners would be protected by the Circuit Court of Appeals; but having been disappointed there, we so deeply feel that these Petitioners have been

unjustly and unfairly dealt with that in our eagerness we fear we have trespassed upon your patience.

The Circuit Court of Appeals lightly touches upon the fact that the post office inspectors gathered information and presented same to the grand jury, independent of the Federal Trade Commission, and therefore, these Petitioners were deprived of the rights given them by the law. This is so idle that we do not argue the same with this court. Congress gave these Petitioners immunity when they, under compulsion, gave up their information to the Federal Trade Commission, then they were completely, fully and forever immune from prosecution about any of the things concerning which they testified and furnished information; and when the Federal Government through one agency get the information, under circumstances which give the Petitioners immunity, then another agency of the same government can not deprive them of that immunity.

These questions are not new to our courts, and in every instance to which our citations have led us, our appellate courts have held that the question of immunity, based upon and growing out of the Fifth Amendment, is one sacred to the preservation of the rights of our citizenship. To say that Congress meant to take away from a citizen a valid right and give nothing in return is but idle talk. So that, Congress, under Art. 8836, in taking away the right of a citizen to claim his privilege from testifying, gave and intended to give him absolute immunity from the prosecution of any transaction, matter or thing about which he had previously testified under the conditions set forth therein. There is nothing left of our vaunted civilization if an absolute right of a defendant, given him by law, is not recognized when invoked by him. The law has no surer champion than

the man who feels that he has had the benefit of all its provisions, even though he is ultimately stricken by it; but when one feels its penalties and its rigors without the privilege of enjoying its safeguards and its fairness, he despairs.

Wherefore these Petitioners pray that the judgment of the trial court and the Circuit Court of Appeals be in all things reversed and judgment here rendered for Petitioners, or that the same be remanded to the trial court with instructions to render such a judgment, or else the cause be reversed and remanded for another trial in conformity with the orders of this court.

Respectfully submitted,

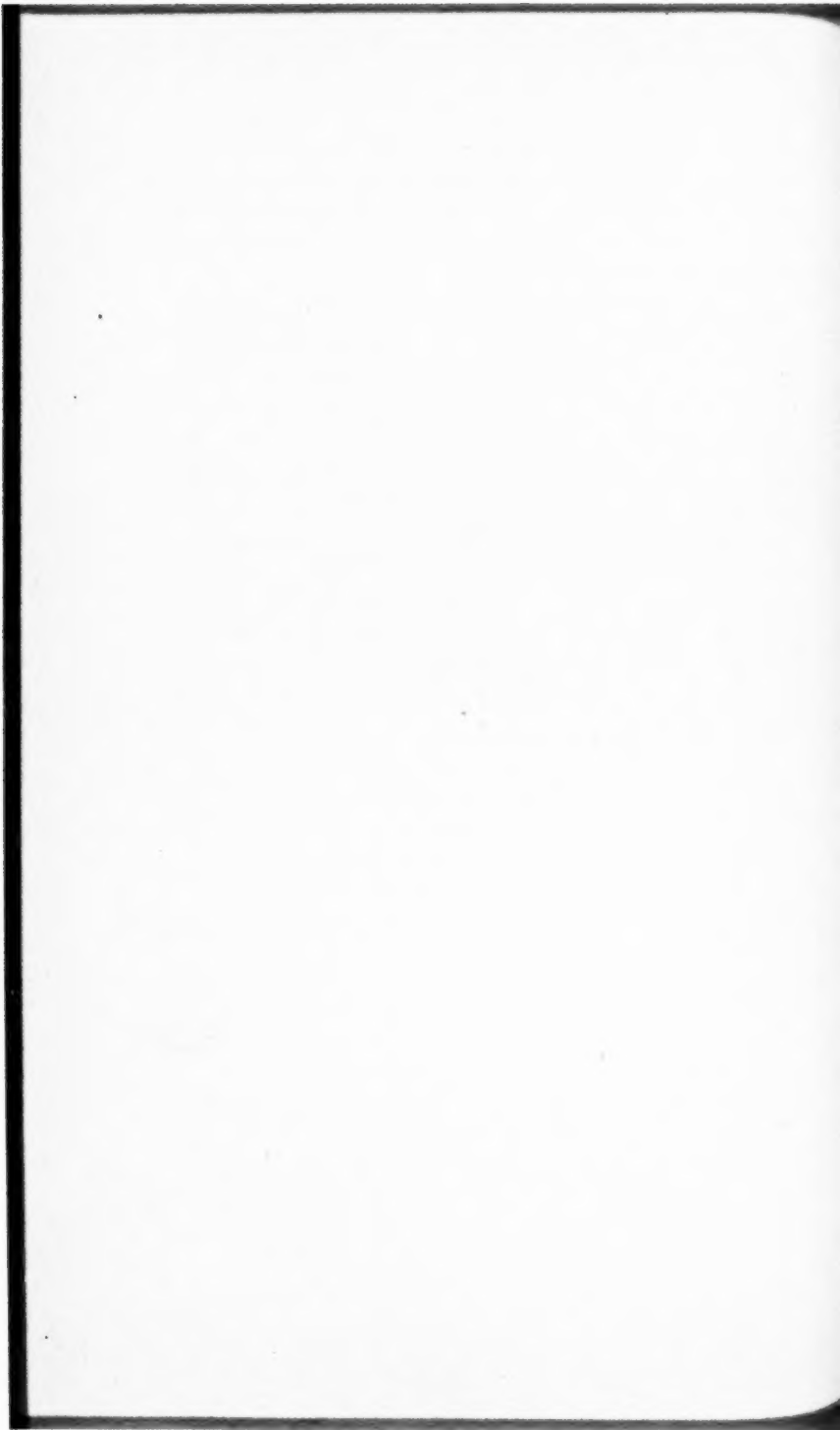
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[PUBLIC—No. 203—63d CONGRESS.]

[H. R. 15613.]

An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commission shall have an official seal, which shall be judicially noticed.

SEC. 2. That each commissioner shall receive a salary of \$10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive a salary of \$5,000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

With the exception of the secretary, a clerk to each commissioner, the attorneys, and such special experts and examiners as the commission may from time to time find necessary for the conduct of its work, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

Until otherwise provided by law, the commission may rent suitable offices for its use.

The Auditor for the State and Other Departments shall receive and examine all accounts of expenditures of the commission.

SEC. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the commission in the exercise of the powers, authority, and duties conferred on it by this Act.

The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

SEC. 4. That the words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" means all documents, papers, and correspondence in existence at and after the passage of this Act.

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce," approved February fourteenth, eighteen hundred and eighty-seven, and all Acts amendatory thereof and supplementary thereto.

"Antitrust acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh.

eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' approved February twelfth, nineteen hundred and thirteen.

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive.

If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the anti-trust acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices,

and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

SEC. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to

the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

SEC. 8. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the commission as he may direct.

SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons making the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than \$1,000 nor more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than \$1,000 nor more than \$5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the

recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

Approved, September 26, 1914.